

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

2015 MAY 15 P 4:02

SHARIF ADHAM SAFWAT,

Plaintiff,

v.

MICHELLE K. LEE,

in her official capacity as Under Secretary of
Commerce for Intellectual Property and
Director of the United States Patent and
Trademark Office,

Defendant.

CLERK'S STAMP
ALEXANDRIA, VA

Civil Action No. 1:15-cv-630
(LO/MSN)

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, Sharif Adham Safwat ("Safwat"), by his attorneys, for his Complaint against Defendant alleges as follows:

NATURE OF THE ACTION

1. This is a civil action by an applicant dissatisfied with a decision by the United States Patent and Trademark Office ("PTO") Patent Trial and Appeal Board (the "PTAB") in the prosecution of U.S. Patent Application No. 12/589,904 ("the '904 application"). Plaintiff seeks a judgment reversing the decision of the PTAB and confirming his rights to a United States patent for his invention, as provided for by 35 U.S.C. § 145.

THE PARTIES

2. Safwat is the inventor and applicant of the '904 application, entitled "FORB HIGHLY ATTRACTIVE TO AND GOOD FOR WHITETAIL DEER."

3. Defendant, the Honorable Michelle K. Lee, is the Under Secretary of Commerce for Intellectual Property and Director of the PTO, who in her official capacity as Director of the PTO (located in Alexandria, Virginia) is within the jurisdiction of this Court. Ms. Lee is hereby sued in her official capacity as Director.

JURISDICTION AND VENUE

4. Jurisdiction and venue are proper in this Court pursuant to 35 U.S.C. § 145 and 28 U.S.C. §§ 1331, 1338(a), and 1391.

5. The PTAB decision was initially rendered in a "Decision on Appeal" mailed January 2, 2015, and was reconsidered in a "Decision on Request for Rehearing" mailed March 19, 2015. As such, this Complaint is being timely filed in accordance with 35 U.S.C. § 145, within sixty days of the Board's "Decision on Request for Rehearing."

6. The PTAB decision was a final decision within the meaning of 37 C.F.R. § 41.2.

7. Plaintiffs have not appealed the decision of the PTAB at issue in this matter to the United States Court of Appeals for the Federal Circuit.

FACTUAL BACKGROUND

8. The claims of the '904 application relate to the use of a forb, namely Lapsana communis (common nipplewort), specifically to attract and nourish whitetail deer. Prosecution of the '904 application on the merits before the PTO examiner ended with a final rejection mailed September 7, 2011. Plaintiffs made a timely appeal to the PTAB, filing an Appeal Brief on March 8, 2012, under 35 U.S.C. § 134(a).

9. There was no Oral Hearing on the appeal.

10. In the "Decision on Appeal" mailed January 2, 2015, the PTAB affirmed the Examiner's rejection of all pending claims 1-22 and 24-27 relying upon a rationale that had not appeared previously during the prosecution of the '904 application.

11. On February 27, 2015, Plaintiff requested rehearing of the Decision on Appeal. On March 15, 2015, the PTAB mailed the "Decision on Request for Rehearing," in which the PTAB reviewed his Decision on Appeal, but denied the Request with respect to making any changes in the outcome.

12. Plaintiff is dissatisfied with the PTAB decision and is filing this civil action pursuant to 35 U.S.C. § 145 to remedy that decision. Specifically, the decision of the PTAB affirming the PTO examiner's rejections of the claims of the '904 application under 35 U.S.C. § 103 was in error, contrary to law, arbitrary, capricious, and an abuse of discretion. Safwat is entitled to the rejected claims of the '904 application and to a patent containing such claims.

SOLE COUNT

13. Paragraphs 1-12 are incorporated herein by reference.
14. The Examiner and the PTAB:
 - (a) failed to establish a *prima facie* case of obviousness;
 - (b) failed to give proper consideration to evidence of record submitted by Applicants that demonstrated both:
 - i. a failure of the sole item of prior art applied in rejecting the '904 application's claims as to disclose or even suggest the invention; and
 - ii. the unpredictable nature of the claimed methods; and
 - (c) applied incorrect legal standards in ascertaining whether the claims of the '904 application were obvious in view of the cited references.
15. All claims pending in the '904 application are patentable, satisfy the applicable statutory and regulatory requirements, and are entitled to be issued in a patent.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays for the entry of judgment:

- A. Reversing the March 19, 2015, "Decision on Request for Rehearing" of the PTAB;
- B. Declaring that Safwat is entitled to receive a patent for the invention claimed in the '904 application and authorizing the Director to issue such patent in compliance with the requirements of law; and
- C. Granting such other and further relief as the nature of the case may admit or require and the Court shall deem just and equitable.

JURY DEMAND

Safwat demands a trial by jury on all issues so triable.

Respectfully submitted,


Nicholas V. Cumings (VSB # 82022)
ncumings@brigliahundley.com
BRIGLIAHUNDLEY, P.C.
1921 Gallows Road, Suite 750
Tysons Corner, VA 22182
Tel: (703) 883-0880
Fax: (703) 883-0899

Of Counsel:

Donald Schreiber
P.O. Box 2926
Kings Beach, California 96143-2926
Tel: (530) 546-6041
Fax: (530) 546-6041

Counsel for SHARIF ADHAM SAFWAT